Supreme Court, U.S.
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No. 93-753

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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STATE OF NORTH CAROLINA,

Petitioner,

v.

KENNETH MICHAEL BRYANT and
MARVIN EARL WILLIAMS, JR.

Respondents.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

RESPONDENTS' BRIEF IN OPPOSITION

****

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QUESTION PRESENTED

WHETHER NORTH CAROLINA PROPERLY HELD THAT AN INSTRUCTION ON REASONABLE DOUBT WHICH HAD THE SAME DEFECTS AS THE INSTRUCTION FOUND UNCONSTITUTIONAL IN *CAGE V. LOUISIANA* VIOLATED DEFENDANTS' RIGHT TO THE DUE PROCES OF LAW UNDER THE FOURTEENTH AMENDMENT.

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Pursuant to the authority of Rule 15 of the Supreme Court Rules and the request of the Office of Clerk of the Supreme Court of the United States, Marvin E. Williams, by and through his undersigned counsel, respectfully opposes and requests that this Court deny the petitioner's Petition for Writ of Certiorari on the basis of the facts and authorities hereinafter set forth.

Petitioner joined *State v. Williams* and *State v. Bryant* under Rule 12.2 in his Petition of Writ of Certiorari, submitting it as State of North Carolina v. Kenneth Michael Bryant and Marvin Earl Williams, Jr. *State v. Williams* contains significant differences from *State v. Bryant*. The challenged instruction in *Williams* is not part of the original jury charge, but was given by the Trial Court as an additional instruction in the midst of the jury deliberations. The *Williams* instruction and the *Bryant* instruction are both derived from a previous North Carolina opinion, but *Williams* contains additional language which is highly relevant to the question presented to this Court. The challenged instruction was accepted in *Bryant* under the plain error exception to appellate review, but in *Williams* the North Carolina General Statutes mandated appellate review. This Brief in Opposition will concentrate on those aspects of the *Williams* instruction which differ from the *Bryant* instruction. In order not to burden this Court with repetitious argument and pursuant to Rule 15.3, Respondent Williams will not argue the points that he shares in common with Bryant, but instead incorporates herein by reference the Brief in Opposition filed by Respondent Bryant, in particular its references to *People v. Sandoval*, 841 P.2d 862 (Cal. 1992), *cert. granted in part, Sandoval v. California*, 114 S.Ct. 40 (1993)(No. 92-9049). See, Brief in Opposition at 5-7, *North Carolina v. Bryant* (No. 93-753).

CITATION TO OPINION BELOW

Respondent, Marvin E. Williams, was tried and convicted of first-degree murder, burglary by explosives, and attempted safe-cracking on May 31, 1990. On June 5, 1990 the jury returned a verdict sentencing Defendant-Respondent to death and the Trial Court ordered that he be put to death as provided by law on the 10th day of August, 1990. Defendant-

Respondent appealed his verdict and sentence to the Supreme Court of North Carolina and as a result of the appeal was granted a new trial on September 10, 1993. *State v. Williams*, 434 S.E.2d 588 (N.C. 1993) The new trial was granted on the basis that the second reasonable doubt instruction given by the Trial Court contained the same combination of terms as that given in *Cage v. Louisiana*, 498 U.S. 39 (1990) and the instruction taken as a whole could have caused the jury to lower the State's burden of proof. *Williams*, 434 S.E.2d at 592.

JURISDICTION

Respondent Williams accepts Petitioner's Jurisdiction statement, except that he denies that the question of the standard of review before the North Carolina Supreme Court is properly before this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

STATEMENT OF THE CASE

Pursuant to Rule 24.2, these items are omitted since Respondent Williams is satisfied with petitioner's statements of the CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED, AND STATEMENT OF THE CASE.

REASONS THE WRIT SHOULD NOT ISSUE

Petitioner has distorted the instruction given in *State v. Williams* and appellate law in North Carolina: the instruction found unconstitutional in *Williams* is not "North Carolina's" instruction; it contains almost identical language as *Cage*; and the basis for appeal in *Williams* was not only plain error, but also a violation of North Carolina General Statutes.

I. THE INSTRUCTION GIVEN IN STATE V. WILLIAMS CONTAINS THE TERMS PROSCRIBED BY CAGE V. LOUISIANA AND TAKEN AS A WHOLE COULD MISLEAD THE JURY AND LOWER THE STATES BURDEN OF PROOF.

Petitioner states that the only similarity to *Cage* in the challenged instruction is that it contains the words "moral certainty" and "substantial". Petition at 17. Petitioner also repeatedly implies that the unconstitutional instruction is "North Carolina's" instruction. Petition at i, 12, 23. In fact the instruction uses the words and the combination of words condemned by *Cage*, and far from being North Carolina's pattern or statutory instruction it is language abstracted from a 1954 North Carolina Supreme Court case. The challenged instruction in *Williams* is as follows:

> Ladies and gentlemen, I will again define for you the concept of reasonable doubt as it has been defined in a case of our Supreme Court entitled State vs. Hammonds. Ladies and gentlemen, I instruct you that a reasonable doubt is not a vain, imaginary or fanciful doubt but it is a sane, rational doubt. When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or to put it another way, satisfied to a moral certainty of the truth of the charge. If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt, otherwise not. A reasonable doubt as that term is employed in the administration of criminal law is a honest, substantial misgiving generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused. It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony or one born of merciful inclination or disposition to permit the defendant to escape the penalty of the law or one prompted by sympathy for him or those connected with him. That

> is the best definition, ladies and gentlemen that I have run across in my work and I have saved it and use it occasionally and that is the law of this State as it pertains to reasonable doubt. Record on Appeal at 84-84, *State v. Williams*, 434 S.E.2d 588 (No. 264A90) (N.C. 1993) (emphasis added)

This language is commonly used by prosecutors in closing argument to inculcate in jurors' minds a reasonable doubt definition more favorable to the State than that contained in North Carolina's pattern instruction.[1]

Petitioner states that the instruction only has "moral certainty" and a single reference to "substantial" in common with *Cage* and that "moral certainty" is not directly equated with "reasonable doubt". Petition at 17 This is a blatant misrepresentation of the challenged instruction in *Williams*. The *Williams* Court does in fact directly equate reasonable doubt with moral certainty:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced, or to put it another way, satisfied to a moral certainty of the truth of the charge. *State v. Williams*, 434 S.E.2d 588, 592 (N.C. 1993)(emphasis added)

"Meant" and "to put it another way" are equations of terms. Not only is "moral certainty" directly equated to "reasonable doubt", "moral certainty" is repeated and the second time is modified by "an abiding faith". The sentence immediately following the one which equates moral certainty and

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[1] The definition given by the judge in *Williams* is commonly referred to in North Carolina as the *Hammonds* instruction. The North Carolina Supreme Court in 1954 was asked to rule on whether or not a charge that stated that reasonable doubt is one growing out of the testimony of the case is erroneous. After ruling that such a charge is erroneous, the Court proceeded to list a number of definitions culled from previous cases. *State v. Hammonds*, 85 S.E.2d 133, 138 (N.C. 1954). It is this list of definitions strung together by prosecutors and judges, which came to be known in North Carolina as the *Hammonds* reasonable doubt instruction.

reasonable doubt and uses the term abiding faith, adds the *Cage* term "substantial misgiving".

The precedential value of *Cage* does not rely on magic words. *Cage* very clearly states that the correct application of its holding is whether or not a combination of the terms in a particular definition could induce a reasonable juror to interpret the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. *Cage v. Louisiana*, 498 U.S. at 41. The challenged instruction in *Williams* represents a classic example of an instruction taken as a whole changing the burden of proof. This reasonable doubt instruction starts and ends with strong admonitions of what a jury cannot find as a reasonable doubt. In flowery mid-century language, more likely to confuse a modern jury than aid it, the definition asserts that a "a reasonable doubt is <u>not</u> a vain, imaginary or fanciful doubt" and that "[i]t is <u>not</u> a doubt suggested by the ingenuity of counsel or by your own ingenuity <u>not</u> legitimately warranted by the testimony or one born of merciful inclination or disposition to permit the defendant to escape the penalty of the law or one prompted by sympathy for him or those connected with him." *State v. Williams*, Record on Appeal, pp. 84-85 (*emphasis added*) Framing the instruction with negative definitions of reasonable doubt, suggests that the defense must present evidence to support reasonable doubt. The instruction then lowers the State's burden of proof by equating reasonable doubt with moral certainty, abiding faith and substantial misgiving. A jury is not given the opportunity to the parse the language of a written instruction. Instead they only hear the charge read to them once. After listening to this lengthy, negative definition, the jurors are most likely left with the impression that the defendant has the burden of providing evidence of reasonable doubt.

In *Williams* the weight of the challenged instruction is immeasurably heightened by the Trial Court's closing comment: "That is the best definition, ladies and gentlemen that I have run across in my work and I have saved it and use it occasionally and that is the law of this State as it pertains to reasonable doubt." *State v. Williams*, Record on Appeal, pp. 84-84. The Court had already given the State's pattern instruction, which defines reasonable doubt in two clear sentences.[2] By giving an additional instruction and then stating that it is the best one, the Court implicitly instructs that the first definition is faulty, is not the law of the State, and should be ignorred. The jurors were encouraged to concentrate on the differences between the two instructions. As the first instruction did not contain the *Cage* terms and the second one did, the *Williams* Court did not merely use *Cage* terms, but in effect validated the very terms found unconstitutional in *Cage*.

The North Carolina Supreme Court in *Bryant* specifically criticized the moralistic tone in the *Hammonds* instruction derived from terms not found in North Carolina's pattern instruction, which underlines possible independent and adequate state law grounds for finding the second instruction in *Williams* unconstitutional:

> A jury instruction which emphasizes what is good or bad--a moral judgment, rather than truth--an evidentiary judgment, is inconsistent with the role of the jury in deciding the guilt or innocence of the defendant. When a jury is instructed that it may convict if it finds the defendant guilty to a moral certainty it increases the possibility that a jury may convict a person because the jury believes he is morally guilty without regard to the sufficiency of the evidence presented at trial to

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[2] North Carolina's pattern instruction states: "A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt." N.C. Pattern Instruction--Criminal 101.10

prove his guilt. *State v. Bryant*, 432 S.E.2d 291, (N.C. 1993) (The *Williams* opinion states that the Courts decision in *Bryant* controls this issue. *State v. Williams*, 434 S.E.2d 588, 592 (N.C. 1993)

The North Carolina Supreme Court has distinguished between reasonable doubt instructions that are acceptable under *Cage*, and those that are unconstitutional. The North Carolina Court has held that a different reasonable doubt instruction, challenged under *Cage*, is not unconstitutional. *State v. Hudson*, 415 S.E.2d 732 (N.C. 1992), *cert. denied*, 113 S.Ct. 983, *reh'g denied*, 113 S.Ct. 1404 (1993). *Hudson* did not contain the exact Cage terms and the Court concluded the jury could not have been misled by the reasonable doubt instruction. *Id.* at 742-43.

If the U.S. Supreme Court should accept certiorari in *State v. Williams* and rule as Petitioner requests that the reasonable doubt instruction given in *Williams* is not unconstitutional because all of the *Cage* terms are not included, the precedential value of *Cage* will be virtually nullified. *Williams* contains all of the terms condemned by *Cage*, except "grave uncertainty." "Moral certainty" is directly equated to reasonable doubt in *Williams*. The charge take as a whole indisputably lowers the State's burden and may in fact create a burden of proof for the Defendant. A finding that two of the Cage terms is insufficient, that equating reasonable doubt with moral certainty is insufficient and that the meaning of the charge taken as a whole is insignificant will limit *Cage* to the precise Louisiana instruction.

II. THE NORTH CAROLINA SUPREME COURT APPLIED A STANDARD OF REVIEW CONSISTENT WITH NORTH CAROLINA GENERAL STATUTES AND RULES OF APPELLATE PROCEDURE.

The North Carolina Supreme Court did not address the issue of standard of review for the reasonable doubt instruction in *State v. Williams*, as it found *Bryant* controlling. Petitioner asserts that *Bryant* presents this Court with an opportunity to answer the federal question of standard of review for *Cage* violations, but this assertion is not supported by the *Bryant* opinion.[3] Petition at 29. Petitioner, implies that the standard for review is the same in *State v. Bryant* as it is in *State v. Williams*. This is not the case. In both *Williams* and *Bryant* the defendant failed to object at trial. However, in *Williams* this failure is not critical as the challenged instruction was given as an additional instruction, without opportunity for counsel to be heard. North Carolina appellate courts are mandated to review such errors by statute.

In *Williams* the Trial Court originally charged the jury on reasonable doubt using North Carolina's Pattern Jury Instruction.[4] The instruction which was challenged and found unconstitutional was given midway through the jury's deliberations in response to a juror's request for clarification. The new instruction was utterly different from the first one. N.C. Gen. Stat. § 15A-1234(c) states: "Before the Judge gives additional instruction he must inform the parties generally of the instructions he intends to give and afford them an opportunity to be heard." Contrary to this statute, the *Williams* Court did not warn either counsel that he intended to give an entirely different instruction

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[3] Respondent Bryant thoroughly analyzes the question of standard of review under North Carolina's plain error rule and the North Carolina Supreme Court's reliance on *Estelle/Boyd*. We will not burden this Court by repeating his argument, but instead incorporate it herein by reference. Brief in Opposition at 10-13, *North Carolina v. Bryant* (No. 93-753).

[4] *See supra* n. 2

and did not give them opportunity to be heard. The impact of the change in instructions was amplified by the Trial Court's emphasis on the worth of this new and different instruction.

As a general rule in North Carolina, a defendant's failure to object to error by the trial court precludes him from raising the error on appeal. N.C. R. App. Proc. 10(a). North Carolina case law, however, holds that if the alleged error violates defendant's right to a trial by a jury of twelve, the failure to object is not fatal to his right to appeal the question: *State v. Bindyke*, 222 S.E.2d 521 (N.C. 1975). Further, under long-standing North Carolina law: "[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." *State v. Ashe*, 331 S.E.2d 652, 659 (N.C. 1985)(citing *State v. Bryant*, 126 S.E. 107 (N.C. 1925)). Therefore, even though defendant did not object to the challenged instructions, his right to appellate review was preserved by North Carolina General Statute § 15A-1234(c).

As the error in *Williams* is preserved by statute, under North Carolina law the correct standard for review is harmless error analysis, not as Petitioner suggests plain error. Whether the lower court correctly applied a statutory mandate is a state-law matter which this Court should decline to review. See *Henry v. Mississippi*, 379 U.S. 443, 446 (1965) (this court will decline to review state court judgments which rest on independent and adequate state procedural grounds); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (Illinois venue rules not subject to review by this Court).

CONCLUSION

For reasons stated herein, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supplemental Brief Not Available